Filed 10/9/09 P. v. Cash CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ANDREW CASH,

Defendant and Appellant.

F055678

(Super. Ct. No. 6282)

O P I N I O N

THE COURT[*]

APPEAL from a judgment of the Superior Court of Mariposa County. Robert F. Baysinger, Judge. (Retired Judge of the San Joaquin Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Peter J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Stephen G. Herndon and Rachelle A. Newcomb, Deputy Attorneys General, for Plaintiff and Respondent.

[*] Before Ardaiz, P.J.; Vartabedian, J.; and Levy, J.

INTRODUCTION

In 2008, appellant Paul Andrew Cash, then aged age 21, was convicted after jury trial of 10 counts of committing lewd acts on his half-siblings D.S. (hereafter D.) and S.S. (hereafter S.), who were both under the age of 14.[1] Multiple victim and substantial sexual conduct allegations were found true in connection with all counts. (Pen. Code, §§ 288, subd. (a), 667.61, subds. (b) & (e)(5), 1203.066, subd. (a)(7) & (a)(8).) Appellant was sentenced to an aggregate term of 75-years-to-life imprisonment, calculated as follows: consecutive terms of 15 years to life for counts 1, 4, 8, 9, 11 and concurrent terms of 15 years to life for counts 2, 3, 5, 7.

This was not appellant's first criminal proceeding arising from his sexual abuse of younger family members. In 2000, a juvenile criminal wardship petition was found true alleging that appellant, then aged 14, sexually molested D., who was then about five years old, and a male cousin J.S. (hereafter J.), who was then about eight years old.

Also, another of appellant's younger half-brothers, Z.S. (hereafter Z.), reported that when he was about eight years old appellant sexually molested him.

Appellant argues his sentence constitutes cruel and/or unusual punishment under the California and federal Constitutions. We disagree.

FACTS

On multiple occasions in 1999 and 2000, appellant and D. orally copulated each other.

During this same time period, appellant and Z. touched each other's penises. Three or four times per week appellant caused Z. to orally copulate him.

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[1] Sadly, pedophilia and incest are a multi-generational family dynamic; appellant is the product of incest between his mother and one of her brothers. Appellant's mother is also the mother of his half siblings.

In 1999 or early 2000, appellant rubbed J.'s penis and orally copulated him.

Beginning in 1999, appellant and S., who was then six years old, orally copulated each other. These incidents occurred two to three times per week in appellant's room.

Their mother learned that appellant was sexually molesting D. and S. She reported the molestation to the police. As a result of the subsequent juvenile proceedings, appellant was removed from the home and placed with his grandparents. He received counseling. Appellant returned home in June 2000.

In March 2002, appellant lived in a shed near the family's home. Rules were imposed to prevent him from being alone with his siblings but they were not consistently enforced.

For about a one-year period of time, S. would enter appellant's room and they would orally copulate each other. Initially, these incidents occurred about one a week but gradually they became more frequent, until they were occurring about three times per week.

One evening in 2005, appellant and D. orally copulated each other in the family's van while their mother was driving them home from church after dark. D. admitted the sexual conduct to their mother. Instead of calling the police, she imposed additional rules designed to prevent appellant from being alone with his siblings.

After the incident in the van, appellant stopped molesting S. for about nine months to one year. However, when S. was about 10 years old, appellant began touching her inappropriately again. When S. turned 11, appellant began to lie on top of her and move up and down. S. could feel appellant's erection through his clothes. Once, appellant caressed S.'s breasts while he was on top of her. When S. was 12, appellant began exposing himself to her. About a month after her twelfth

birthday, she entered appellant's room. He turned her around and pulled down her pants. Appellant's pants were pulled down and S. felt his penis against her bottom.

In January 2006, appellant's mother sent him to live in Utah, in part because she believed he had a problem with pornography and child molestation.

In February 2007, appellant moved into a trailer next to the family's home. A few weeks before Mother's Day, appellant touched D.'s penis over his clothes while they were alone in the trailer. Appellant removed D.'s clothes and removed his own pants. They orally copulated each other. Then appellant directed D. to get on top of him so they could rub their penises together.

D. later told appellant he felt bad about this incident. Appellant told D. that if he disclosed the molestation, appellant would disclose a sexual encounter that had occurred between D. and a male friend. As a result of this threat, D. did not tell his mother about the molestation.

About a week or two after Mother's Day, D. went into appellant's trailer. Appellant was watching a pornographic movie. D. and appellant orally copulated each other. Appellant motioned for D. to get on top of him and appellant moved D. up and down. Appellant turned onto his stomach and motioned D. to get on his back. Appellant directed D. to put his penis into appellant's anus.

In June or July 2007, their mother asked D. if he had any problems with appellant. D. disclosed the molestation to her and she reported it to the police. After appellant's arrest, S. disclosed that he was molesting her.

DISCUSSION

I. Appellant forfeited direct review of his sentence's constitutionality.

It is undisputed that defense counsel did not object during the sentencing hearing on the ground that appellant's sentence constituted cruel and/or unusual punishment in violation of the California and federal Constitutions. It is well-

settled that challenge to a sentence on the ground that it constitutes cruel and/or unusual punishment is a fact specific claim that must be presented in the first instance to the sentencing court. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) Since appellant failed to object on this ground below, he forfeited direct appellate consideration of the issue.

II. Defense counsel was not ineffective.

Appellant also contends defense counsel was ineffective because he failed to object to his sentence as cruel and/or unusual punishment. We are not persuaded.

The standard applied to ineffective assistance of counsel claims is axiomatic. Appellant bears the burden of showing that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors and omissions, it is reasonably probable that the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Defense counsel is not required to make futile objections or advance meritless arguments. (*People v. Jones* (1979) 96 Cal.App.3d 820, 827.)

As will be explained, appellant's sentence does not violate the California or federal constitutional prohibitions against cruel and/or unusual punishment. Therefore, defense counsel's failure to object on this ground was not unreasonable and appellant was not prejudiced by the omission.

A. Appellant's sentence does not constitute cruel or unusual punishment under the California Constitution.

The California Constitution prohibits cruel or unusual punishment. This provision is interpreted separately from its federal counterpart. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) "A punishment may violate the California Constitution although not 'cruel or unusual' in its method, if 'it is so

disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*Ibid*.) "We consider three areas of focus for assessing disproportionality: (1) an examination of the nature of the offense and the offender; (2) a comparison of the sentence with punishments for different offenses in the same jurisdiction; and (3) a comparison of the sentence with punishments for the same offense in other jurisdictions. [Citation.]" (*People v. Uecker* (2009) 172 Cal.App.4th 583, 600 (*Uecker*) [50 years to life for stalking two women upheld].)

Appellant claims his offenses are relatively minor and the sentence is grossly disproportionate. We disagree. There is nothing in the facts of the offenses or in appellant's background compelling a conclusion that his sentence is grossly disproportionate to the crimes he has committed sufficient to shock the conscience and offend notions of human dignity. Appellant was convicted of 10 felony accounts of committing lewd acts upon two victims, his own siblings. These victims are particularly vulnerable and the crimes are very serious. As their elder brother, appellant occupied a position of trust. He took advantage of this position to gratify his own sexual desires. Appellant's offenses were made possible by exploiting the affection and trust of his own parents. Appellant began molesting the victims when they were still quite young. He did not commit a single impulsive act, but instead engaged in a long course of predatory behavior. He attempted to silence his victims by either threatening them or telling them to keep his actions a secret. The consequences to the victims were extensive: they were robbed of their childhood innocence and forced to live in fear for years. The long-term emotional damage appellant inflicted cannot be dismissed as nonconsequential. Although appellant is relatively young, he has a prior juvenile adjudication for child molestation. Lenity and therapeutic treatment in the juvenile system were unsuccessful; when appellant returned to the family home,

he re-victimized his siblings. The prior juvenile adjudication for the same lewd conduct clearly demonstrated to appellant the criminal nature of his actions and their serious consequences. Therefore, appellant's youth, immaturity and intellectual limitations do not lead us to conclude that he failed to grasp the nature and consequences of his actions. Appellant's callous and opportunistic sexual exploitation of younger siblings seems to us to be precisely the sort of crime warranting harsh punishment. (*People v. Alverado* (2001) 87 Cal.App.4th 178, 200.)

No other factors convince us that this matter involves the rarest of cases where the length of the sentence is unconstitutionally excessive. The intra-jurisdictional and inter-jurisdictional considerations do not persuade us that appellant's punishment is disproportionate. Appellant's effort to compare his sexual crimes to other categories of offenses such as drug sales or attempted murder is unpersuasive. We reject appellant's effort to minimize the seriousness and lasting damage caused by his prolonged molestation of his siblings. The penalties for single offenses cannot properly be compared to those for multiple offenses against numerous victims occurring over a course of years. (*People v. Crooks* (1997) 55 Cal.App.4th 797, 807.) Also, the mere fact that California's sentencing law might be among the harshest for specified sexual offenses does not make it unconstitutional. Otherwise, California could never take the toughest stance against specific types of criminal conduct. (*Uecker, supra*, 172 Cal.App.4th at p. 601; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.).)

"[A]ppellate courts have held that lengthy sentences for multiple sex crimes do not constitute cruel or unusual punishment." (*People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531 [129 years for sex crimes against stepdaughter upheld]; see also *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231 [135 years for molestation of four children upheld]; *People v. Estrada* (1997) 57 Cal.App.4th

1270, 1277-1282 [25-year minimum term under One Strike law upheld]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666-667 [283 years for sex offenses on seven victims upheld].) Following and applying these authorities, we conclude appellant's sentence does not constitute cruel or unusual punishment.

B. Appellant's sentence does not constitute cruel and unusual punishment under the federal Constitution.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. However, there is no requirement of strict proportionality between the crime and sentence. The Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. (*Uecker*, *supra*, 172 Cal.App.4th at p. 601.)

The United States Supreme Court has upheld statutory schemes resulting in life imprisonment with the possibility of parole for recidivists against Eighth Amendment challenge. (*Ewing v. California* (2003) 538 U.S. 11 [25 years to life for theft of three golf clubs upheld]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [two consecutive terms of 25 years to life for two separate thefts of videotapes upheld]; *Rummell v. Estelle* (1980) 445 U.S. 263 [life sentence with possibility of parole upheld for recidivist who fraudulently used a credit card, passed a forged check and obtained small sum by false pretenses].) Appellant was convicted of committing 10 serious felonies for lewd acts with substantial sexual conduct upon two children. As discussed in connection with appellant's California constitutional claim, his sentence is not grossly disproportionate to his crimes. Appellant's sexual offenses are substantially more serious crimes than theft or other nonviolent offenses and he has an opportunity for eventual release on

parole.[2] Therefore, he cannot successfully claim that his sentence violates the Eighth Amendment. (*Uecker, supra,* 172 Cal.App.4th at p. 602.)

DISPOSITION

The judgment is affirmed.

[2] For these same reasons, appellant's reliance on *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*) [life sentence without possibility of parole for $100 bad check with six nonviolent priors violated Eighth Amendment] is misplaced. The seriousness of his crimes and the availability of parole render *Solem* factually distinguishable.